

The Board has considered the record and has adopted the stipulations listed in the Award.

ISSUES

Both claimant and respondent appealed and requested Board review of the following issues:

1. What is the nature and extent of disability attributable to claimant's work-related accident?
2. Is claimant entitled to temporary total disability benefits?
3. Is claimant entitled to payment of future and unauthorized medical expenses?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Board makes the following findings and conclusions:

Claimant sustained a work-related injury on October 23, 1997. The ALJ found that claimant is permanently and totally disabled. However, he awarded claimant permanent partial general disability benefits. According to the ALJ, claimant did not sustain his burden of proving that it was more probably true than not that his permanent total disability was attributable solely to his workplace accident and injury.

On appeal, claimant argues that the ALJ erred by reducing claimant's permanent total disability to a permanent partial general disability award because of a subsequent motor vehicle accident. Conversely, respondent argues that claimant's work-related injury was either a temporary aggravation of a preexisting condition or the permanent injury sustained was permanently aggravated by an intervening February 15, 1999, motor vehicle accident.

For the following reasons, the Board finds the ALJ's permanent partial general disability award should be modified to award claimant permanent total disability benefits.

The parties stipulated that on October 23, 1997, while working for respondent, claimant struck his neck and left shoulder on a protective steel cage surrounding a ladder when claimant lost his grip on a rung of the ladder he was climbing. Thereafter, as noted by orthopaedic physician, Dr. Dale E. Darnell, the court ordered independent medical examiner, in his June 14, 2000, report, claimant "saw many different physicians, many different diagnoses were entertained and finally in November of 1998, a diagnosis of

cervical spinal stenosis was made . . .”¹ As a result, claimant underwent a multilevel posterior cervical laminectomy.

The many medical experts that testified and otherwise provided opinions in this matter all agree that claimant suffered from a preexisting and progressive degenerative disease with associated anatomical findings involving his cervical spine. They nevertheless disagree about whether the work accident aggravated this condition resulting in permanent disability or whether the intervening February 15, 1999, motor vehicle accident is the actual cause of claimant’s current level of disability.

The Board is mindful of the medical evidence presented by the parties regarding the issue of permanency after the work-related accident. But the Board finds that the results of claimant’s multilevel cervical laminectomy render the issue moot. Regardless of the original nature of claimant’s injury, a board certified neurosurgeon and claimant’s authorized treating physician, Dr. K.N. Arjunan, performed cervical spinal surgery on claimant. The Board finds the preponderance of the evidence supports that claimant’s current permanent total disability is the result of the failed surgery, not the intervening motor vehicle accident.

Dr. Robert A. Rawcliffe, an orthopedic surgeon, evaluated claimant in March 1998. In his March 1998 report, he emphatically recommended against surgery:

I’m unable to find objective evidence on physical examination of a herniated disc in either the cervical or lumbar spine and would advise against any surgical procedure regarding (sic) of the findings on MRI study, myelogram, or CT scan. It is well known that positive findings on these studies can be found in individuals who have been totally asymptomatic and a decision to operate based on the X-ray findings alone can often lead to disaster.²

Despite Dr. Rawcliffe’s opinion, Dr. Arjunan performed a multilevel cervical laminectomy in November 1998. Respondent directs the Board’s attention to evidence in the record supporting that the February 1999 motor vehicle accident, not the surgery, caused deterioration in an improving post-surgery medical condition and thus claimant’s permanent total disability.³ However, this testimony comes from Dr. Arjunan who performed claimant’s surgery, and the Board is not persuaded by Dr. Arjunan’s opinion regarding causation because of the probability that the surgery was the major contributor to claimant’s resulting permanent total disability.

¹ Darnell report at 1 (June 14, 2000).

² Rawcliffe Depo., Ex. at 9.

³ Arjunan Depo. at 20-26 (Aug. 11, 1999).

In light of Dr. Rawcliffe's prediction and Dr. Arjunan's obvious interest in this case, the Board finds more persuasive the testimony of another of claimant's treating physicians, Dr. Jonson Huang, a board certified neurologist. Dr. Arjunan's testimony and Dr. Huang's testimony are consistent to the extent they both acknowledge a new spinal cord condition called myelomalacia after the motor vehicle accident. However, unlike Dr. Arjunan, Dr. Huang characterizes this new injury, the only objective evidence of additional injury, to a postoperative change not attributable to the motor vehicle accident.⁴

Respondent argues that the Board should disregard Dr. Huang's testimony because his testimony given at his first deposition conflicts with that given at his second. However, while Dr. Huang testified during his first deposition that it was reasonable to assume that claimant's increased symptoms were attributable to the motor vehicle accident, he also opined that the only physical change in claimant's spine after the accident was myelomalacia. He stated that myelomalacia is a "general risk" of cervical surgery, and "the nature of the motor vehicle accident was not of the magnitude that we should see changes within the spinal cord."⁵ So, contrary to respondent's argument, Dr. Huang's testimony at his second deposition did not conflict with his testimony given during his first deposition. Instead, the totality of Dr. Huang's testimony supports that claimant's current condition is attributable solely to the work-related accident and resultant surgery.

Dr. Huang's testimony is bolstered by medical evidence in the record reflecting the recurrence of pre-surgery symptoms and new symptoms before the motor vehicle accident. For instance, although Dr. Joseph G. Sankoorikal, a rehabilitation specialist, did not testify, his February 10, 1999, report was nonetheless made a part of the record.⁶

Dr. Sankoorikal evaluated claimant just five days before his motor vehicle accident. At that time, claimant reported pain in both arms, swelling in his neck, and bilateral numbness in his hands. In addition, he complained of spasm and burning in his left hand, and Dr. Sankoorikal noted decreased flexion and extension in claimant's neck due to "some neuropathic type of pain and electricity-type of pain." So while claimant's post-operative condition may have improved in some respects before the motor vehicle accident, there was also evidence of new and increasing symptomatology before the motor vehicle accident. This evidence also corroborates Dr. Huang's conclusion.

Moreover, the Board finds corroborative and persuasive the evidence in the record reflecting a similarity between the symptoms claimant suffered before and after the motor vehicle accident. As noted in Dr. Darnell's June 14, 2000 report, claimant currently suffers

⁴ Huang Depo. at 21 (Nov. 17, 1999).

⁵ Huang Depo. at 21-22 (Nov. 17, 1999).

⁶ Schiffelbein Depo., Ex. 1.

from, among other things, “a shocking feeling” from the “right side of his neck to his arm, his chest wall, both legs and toes.” In addition, claimant “has no control over the muscles in his body and does not have any ability to do activities that require fine motor coordination of his hand.”⁷ Before claimant’s motor vehicle accident, various physician’s noted this shocking pain and “significant spacticity,” including Dr. Arjunan as evidenced by his March 29, 1999 report.⁸

In addition to the objective evidence of operative injury and new and increasing symptoms after the surgery, the Board finds corroborative and persuasive the testimony of Dr. Dean L. Wampler who is board certified in internal medicine, occupational medicine and independent medical evaluation. Although Dr. Wampler did not examine claimant or believe that claimant sustained a work-related accident or injury, Dr. Wampler reviewed claimant’s medical history and opined that the motor vehicle accident “did not produce any more than a temporary aggravation of his chronic postoperative symptoms.”⁹ Again, this evidence corroborates Dr. Huang’s conclusion.

Accordingly, when the Board considers Dr. Huang’s opinion in connection with the foregoing evidence and weighs it against all other evidence of record, the Board finds that the preponderance of the evidence supports a finding that claimant’s current medical condition is related to “Post laminectomy syndrome with surgery to the cervical spine,”¹⁰ not claimant’s motor vehicle accident. Therefore, the Board concludes that claimant’s resultant disability is compensable as a natural and direct consequence of medical treatment for his work-related injury.¹¹

As for respondent’s argument regarding claimant’s non-entitlement to temporary total disability benefits, claimant accurately points out that respondent did not raise the issue before the ALJ.¹² The Board does not generally address issues presented for the

⁷ Darnell IME report at 2 (June 14, 2000).

⁸ Wampler Depo., Ex. 2.

⁹ Wampler Depo., Ex. 2 at 5.

¹⁰ Sankoorikal report (Feb. 10, 1999), Schiffelbein Depo., Ex. 1 at 3.

¹¹ *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990) (injury or death which is caused by medical treatment for a compensable injury is considered a direct and natural result of the primary injury and is compensable); *Wilson v. Mercy Medical Center*, No. 237,181, 2000 WL 759430 (Kan. WCAB May 23, 2000); *Simmons v. Flint Hills Job Corps*, No. 209,343, 1999 WL 1314827 (Dec. 14, 1999); *Burress v. Rickert Industrial Coatings and Home Industrial Coatings*, No. 206,007, 1996 WL 167238 (March 21, 1996); *Moore v. Ace Electric Co.*, No. 159,670, 1994 WL 749112 (Sep. 19, 1994).

¹² R.H. Trans. at 5-6.

first time on appeal.¹³ Therefore, for that reason and because the foregoing holding renders the issue moot, the Board need not address respondent's arguments.

In finding that claimant's permanent and total disability is attributable to his work-related injury under the principles of *Roberts v. Krupka*, the Board also finds claimant is entitled to future medical treatment upon proper application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Board that ALJ Brad E. Avery's August 10, 2001, Award, should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Leland E. Glaser, and against the respondent, Modern Air Conditioning, Inc., and its insurance carrier, Allied Mutual Insurance Company, for an accidental injury which occurred on October 23, 1997, and based upon an average weekly wage of \$560 per week.

Claimant is entitled to 123.57 weeks of temporary total disability compensation at the rate of \$351.00 per week or \$43,373.07, followed by \$81,626.93 of permanent total disability compensation to be paid at the rate of \$351.00 per week, making a total award of \$125,000.00.

As of October 31, 2002, there is due and owing claimant 123.57 weeks of temporary total disability compensation at the rate of \$351 per week or \$43,373.07, followed by 138.43 weeks of permanent total disability compensation at the rate of \$351 per week in the sum of \$48,588.93, for a total of \$91,962.00, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$33,038.00 is to be paid at the rate of \$351 per week, until fully paid or further order of the Director.

The Board adopts the remaining orders in the Award that are not inconsistent with the above.

¹³ *Mackey v. Deffenbaugh Industries, Inc.*, No. 1,001,401, 2002 WL 1838716 (Kan. WCAB Jul. 30, 2002); *Stamps v. Sai Automotive, Inc.*, No. 244,563, 1999 WL 1008015 (Oct. 21, 1999); *Garnica v. Boeing Co.*, No. 228,939, 1998 WL 229899 (Apr. 22, 1998).

IT IS SO ORDERED.

Dated this _____ day of October, 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation